No. 14371.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

E. N. MURRAY,

Appellant.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

The appellant was indicted by the Federal Grand Jury in and for the Southern District of California on April 29, 1953, under Sections 371, 545, 1621 and 1001 of Title 18 of the United States Code. [T. R. pp. 2-12.]

On May 22, 1953, the appellant entered a plea of not guilty to all counts. On September 26, 1953, the appellant withdrew his plea of not guilty as to Counts One and Four and entered a plea of guilty thereto. On October 12, 1953, the appellant was sentenced for a period of 18 months on Count One and to a period of 18 months on Count Four, said sentences to run consecutively. Counts

Two, Three and Five of the Indictment were dismissed on the same date. [T. R. pp. 13-14.]

On December 4, 1953, the appellant filed a motion for correction of sentence under Title 28, Section 2255 of the United States Code. This motion was denied [T. R. pp. 15-16] and such denial was set forth in the Clerk's minutes [T. R. p. 17], and ordered filed May 21, 1954, *nunc pro tunc* to December 22, 1953. On February 10, 1954, the appellant filed a supplementary ground in support of motion for correction of sentence which motion was again denied by the Court, filed February 15, 1954. [T. R. p. 21.]

The District Court has jurisdiction of this cause of action under Title 18, United States Code, Section 3231.

This Court has jurisdiction of the appeal under Sections 1291 and 2255 of Title 28, United States Code.

II.
STATUTES INVOLVED.

The Indictment in this case was under Sections 371, 545, 1621 and 1001 of Title 18. As the appellant entered pleas of guilty as to the offenses charges in Counts One and Four of the Indictment, only the statutes pertaining to those two counts will be set forth herein.

Count One of the Indictment charged a violation of Sections 371 and 545 of Title 18, United States Code, Section 371 provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such

persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 545 of Title 18, United States Code, provides in its pertinent part as follows:

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

"Shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Count Four of the Indictment charges a violation of Section 1621 which provides as follows:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify

truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

III.
STATEMENT OF THE CASE.

The Indictment charges as follows:

COUNT ONE.
(U. S. C., Title 18, Sec. 371; 545.)

Commencing on or about January 1, 1952, and continuing up to and including the 2nd day of April, 1953, in San Diego County, California, and in Imperial County, California, both in the Southern Division of the Southern District of California and in Customs Collection District No. 25, the defendants E. N. Murray and Charlotte Murray and their unindicted co-conspirators Richard Rolland Ray, Francisco Limon, Bobby Rangel and Gilbert Gastellum, not named as defendants herein, and other persons to the Grand Jury unknown, did knowingly and willfully combine, conspire, confederate and agree together and with each other to commit offenses against the United States in violation of Section 545 of Title 18, United States Code, as follows:

1. Defendants E. N. Murray and Charlotte Murray and their unindicted co-conspirators Richard Rolland Ray, Francisco Limon, Bobby Rangel, and Gilbert Gastellum and other persons to the Grand Jury unknown would

knowingly and willfully and with intent to defraud the United States, smuggle and clandestinely introduce into the United States merchandise, to-wit, various and sundry kinds of psittacine birds from a foreign country, namely, Mexico, which should have been invoiced;

2. Defendants E. N. Murray and Charlotte Murray and their unindicted co-conspirators Richard Rolland Ray, Francisco Limon and Gilbert Gastellum would knowingly and fraudulently import and bring into the United States of America from a foreign country, namely, Mexico, certain merchandise, to-wit, birds of the psittacine family, contrary to law; and,

3. Said defendants E. N. Murray and Charlotte Murray and their unindicted co-conspirators Richard Rolland Ray, Francisco Limon, Bobby Rangel and Gilbert Gastellum, and other persons to the Grand Jury unknown, would knowingly and willfully receive, conceal and facilitate the transportation and concealment after importation of certain merchandise, namely, birds of the psittacine family, from a foreign country, namely, Mexico, knowing the same to have been imported or brought into the United States contrary to law.

The said combination, conspiracy and confederation being in violation of Title 18, United States Code, Section 371.

To effect the objective of said conspiracy the defendants E. N. Murray and Charlotte Murray and their unindicted co-conspirators committed diverse overt acts in San Diego County, California, and in Imperial County, California, and in Customs Collection District No. 25, all within the

Southern Division of the Southern District of California, among which are the following:

1. That on or about the 12th day of November, 1952 the defendant E. N. Murray placed an order with his unindicted co-conspirator Francisco Limon of Mexico City, Mexico, for the purchase of 526 parakeets, 100 love birds and 48 yellow-naped parrots;

2. That on or about the 12th day of November, 1952, the defendant E. N. Murray flew to Mexico City to examine said shipment of birds;

3. That on or about the 14th day of November, 1952, the defendant Charlotte Murray and her unindicted co-conspirator Richard Rolland Ray drove to the International Boundary line between the United States and Mexico in Imperial County, California, to receive said shipment of birds;

4. That on or about the 14th day of November, 1952, the defendants E. N. Murray and Charlotte Murray caused the said shipment of birds to be smuggled across the International Boundary line from Mexico into the United States in Imperial County, California;

5. That on or about November 14, 1952, defendant Charlotte Murray paid the sum of $4,224.00 for said shipment of birds;

6. That on or about the 14th day of November, 1952, the unindicted co-conspirator Richard Rolland Ray placed said shipment of birds in his 1950 Chevrolet automobile and drove in a northerly direction on Highway 101 towards Los Angeles, California;

7. That on or about the 5th day of January, 1953, the defendant E. N. Murray filed a false affidavit with the

Clerk of the United States District Court in and for the Southern District of California, Southern Division;

8. That on or about the 1st day of April, 1953, the defendant E. N. Murray gave a check in the sum of $461.00 to his unindicted co-conspirator Gilbert Gastellum;

9. That on or about the 2nd day of April, 1953, the defendant E. N. Murray gave a check in the sum of $1,606.00 to his unindicted co-conspirator Gilbert Gastellum.

COUNT TWO.
(U. S. C., Title 18, Sec. 2; 545.)

Omitted as not being applicable.

COUNT THREE.
(U. S. C., Title 18, Sec. 2; 545.)

Omitted as not being applicable.

COUNT FOUR.
(U. S. C., Title 18, Sec. 1621.)

That on or about the 15th day of January, 1953, at San Diego, California, within the Southern Division of the Southern District of California, the defendant E. N. Murray did file with the Clerk of the United States District Court in and for the Southern District of California, Southern Division, an affidavit which was taken under oath before Dorothy M. Quiring, a person authorized by the laws of the United States to administer an oath, to-wit, a Notary Public in and for the County of Los Angeles, State of California, and in said affidavit the defendant E. N. Murray after first being duly sworn,

deposed and said as follows, an exact copy of which is set forth below:

"That he is a resident of the County of Los Angeles; that he is the owner of the following birds:

450 Normal Paraketts
74 Yellow Faced Parakeets
32 Lutino and Albino Parakeets
100 Fisher Love Birds
48 Panama Parrots

"That on or about November 15, 1952, said birds were turned over to the defendant herein, Richard Ray, for the purpose of resale to various dealers in and about San Diego County; that your affiant is in the business of raising and selling birds; that the birds involved were in the possession of the defendant and were legally in the United States, having either been raised by your affiant or purchased by him from other bird dealers in the State of California.

"That he is entitled to the possession of said birds and that Richard Ray was legally in possession of the birds at the time of his arrest on November 15, 1952;

"Further affiant sayeth not.

E. N. Murray

Subscribed and sworn to before me this 2nd day of January, 1953.

Dorothy M. Quiring,
Notary Public in and for the County of Los Angeles, State of California."

That at said time and before said Notary Public the defendant E. N. Murray declared that he would testify, declare, depose and certify truly that the contents of said

affidavit certified by him, subscribed were true, whereas the defendant E. N. Murray did knowingly and willfully and contrary to said oath state and subscribe to a material matter which he knew and did not believe to be true, to-wit:

That said E. N. Murray deposed as follows:

> "That the birds involved were in the possession of the defendant and were legally in the United States, having either been raised by your affiant or purchased by him from other birds dealers in the State of California; that he is entitled to the possession of said birds and that Richard Ray was legally in possession of the birds at the time of his arrest on November 15, 1952."

Whereas, in truth and in fact, the defendant E. N. Murray knew that said birds had been purchased from Francisco Limon in Mexico City on or about November 12, 1952, and that said E. N. Murray had arranged to have said Francisco Limon ship said birds via C. M. A. Airlines from Mexico City to Mexicali, Mexico, consigned to Bobby Rangel; that further, the defendant well knew that said Bobby Rangel was to receive shipment of said birds and deliver them to Charlotte Murray and Richard Rolland Ray by smuggling them across the International Boundary line dividing the United States and Mexico in Imperial County, California, on November 14, 1952, and that said E. N. Murray knew that he had instructed the said Charlotte Murray and Richard Rolland Ray to receive said birds for him after they had been smuggled into the United States on November 14, 1952, and the defendant E. N. Murray well knew that he had instructed the said Richard Rolland Ray to receive said birds and transport them to Los Angeles, California;

That all of said facts and the affidavit of the defendant E. N. Murray heretofore alleged were material to the proceedings then being conducted in the United States District Court in and for the Southern District of California, Southern Division, in the case of the United States of America versus Richards Rolland Ray, Case No. 22020-SD.

COUNT FIVE.
(U. S. C., Title 18, Sec. 1001.)

Omitted as not being applicable.

On September 26, 1953, the appellant, represented by Milton Silverstein, Esquire, appeared before the Honorable Jacob Weinberger, United States District Court Judge, and entered pleas of guilty to the offenses charged in Counts One and Four of the Indictment.

On October 12, 1953, the appellant was sentenced to imprisonment for a period of 18 months on Count One and for a period of 18 months on Count Four, said periods of imprisonment to begin and run consecutively and not concurrently.

Appellant assigns as error the judgment of conviction on the following grounds:

(a) There cannot be assessment of more than one punishment on two different counts arising out of the same transaction. (App. Br. p. 2.)

(b) The appellant should have been sentenced for violation of a specific law, importation of psittacine birds instead of the general act. (App. Br. p. 7.)

IV.

STATEMENT OF FACTS.

As stated by the appellant in his brief there is no factual dispute on appeal and all questions are on matters pertaining to law.

V.

ARGUMENT.

A. Consecutive Sentences May Validly Be Given on One Count of Conspiracy and One Count of Substantive Charge of Perjury.

Where an indictment charges both a conspiracy to engage in a course of criminal conduct and a series of substantive offenses committed pursuant to the conspiracy, the substantive offenses are not merged into the conspiracy; and upon conviction, the accused may be punished both for the conspiracy and for the substantive offenses.

Pinkerton et al. v. United States, 328 U. S. 640.

The foregoing principle has been followed in many other cases. In *United States v. Bayer,* 331 U. S. 532, the Supreme Court again followed the ruling in the *Pinkerton* case, *supra,* and stated as follows:

> "The indictment is for conspiring and we have but recently reviewed the nature of that offense. Its essence is in the agreement or confederation to commit a crime, and that is what is punishable as a conspiracy if any overt act is taken in pursuit of it. The agreement is punishable whether or not the contemplated crime is consummated. But the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, if the agreement to do the act is distinct from the act itself."

This court in *Kobey v. United States,* 208 F. 2d 583, cited with approval and followed the principle of the *Bayer* case.

In the case now before this court it is clear that one count deals with conspiracy, and the other count to which the appellant entered a plea of guilty is a substantive count, to-wit, perjury. In view of the foregoing principle, it is clear that sentences could be imposed on both counts and that said sentences could be imposed to run consecutively. It might also be said in passing that the offense of conspiring to violate Section 545 of Title 18 of the United States Code requires much different proof than that of the crime of perjury. It is a general rule of criminal law that double jeopardy does not attach where the crimes require different elements of proof.

The cases cited by the appellant in support of his first argument deal with charges of more than one conspiracy arising out of the same general factual situations. The court in each cited instance very properly held that where the facts show a single conspiracy, sentence cannot be imposed on more than one conspiracy count, even though the attempt is made to create separate counts of conspiracy. It is respectfully submitted that that is not the situation in the case now before this court.

Those cases cited by the appellant dealing with the specific charge of perjury are likewise not in point, as the facts there show that the defendants had been tried for a specific crime, had testified in their own behalf, and were thereafter indicted for perjury because of such testimony. As the proof of the perjury necessitated the trial of the major elements of the prior offense, the court very properly held that jeopardy did attach and that the subsequent

indictment for perjury was therefore improper. It is interesting to note that in *Chitwood v. United States* (Ark., 1910), 178 Fed. 442, the court reversed and remanded for a new trial on the perjury charge as the alleged perjuror's statement did not go to the material element of the prior substantive charge. It is clear from reading the present indictment that the perjury charge could have well been left out of the conspiracy count without affecting the validity of the charge. In other words, there were sufficient allegations remaining in the conspiracy count to support a conviction even if the perjury allegations were deleted therefrom.

B. The Appellant Was Properly Indicted and Sentenced Under Section 545 of Title 18, United States Code.

Section 545 of Title 18 of the United States Code is the basic law concerning the importation of all merchandise into the United States.

This and companion sections were specifically passed by an Act of Congress. The appellant must contend that the regulations of the Surgeon General either repeal Section 545 or remove psittacine birds from the meaning of the word "merchandise." The appellee respectfully contends that both positions are untenable in view of the reasons behind both Section 545 and the Surgeon General's regulations. In that connection, the regulations on which the appellant relies are found in Chapter One of the Public Health Service, Federal Security Agency. This chapter contains the following subchapter headings: Subchapter A: General Provisions; Subchapter B: Personnel; Subchapter C: Medical Care and Examinations; Subchapter

D: Grants; Subchapter E: Fellowships, Interneships, Training; Subchapter F: Quarantine, Inspection, Licenses.

Subchapter F is divided into three sections: Foreign Quarantine, Interstate Quarantine, and Biologic products. Foreign quarantine, in turn, is further divided into categories requiring vaccination for cholera, plague, and other diseases, quarantine of vessels and aircraft at ports of entry, rodent and vermin control, and in subpart j, importation of certain things, such as psittacine birds, cats, dogs, monkeys, dead bodies, and the like. It is within this last category of subpart j, that the section is found which the appellant must contend repeals Section 545 of Title 18, United States Code. It would seem clear that Congress, in delegating to the Surgeon General certain powers to promulgate regulations in connection with the public health, including quarantine, inspection, and licensing, did not intend to permit the Surgeon General to abrogate a specific Congressional enactment. The Government may elect, and has so elected in this case, to proceed upon a violation of the basic border law of Section 545 of Title 18, United States Code, and need not proceed on the basis of a violation of the regulations of the Surgeon General, even though the facts are such that violations of both the statute and the regulation exist. The foregoing point was before the Second Circuit in 1943 in the case of *United States v. Kushner,* 135 F. 2d 668. The defendant there was charged with a violation of what is now Section 545 of Title 18, United States Code. The facts in that case show that the defendant and others, over a period of years, had imported gold bullion into the United States from Canada without complying with the requirements of Customs statutes. The defendant contended that he should have been charged with a violation of the Gold Reserve

Act, which act specifically pertains to the importation of gold. The court recognized that the Gold Reserve Act was promulgated with a view of stabilizing the domestic monetary economy, and, therefore, the act was not at all inconsistent with present Section 545 which is directed towards the efficiency of Customs administration and the control of all importations. It was further stated that each statute stands for a separate function, and where there are reasonable grounds for the continued effectiveness of both statutes, a repeal by implication will not be presumed. The court distinguished the case cited by appellant herein, *Palermo v. United States* (1st Cir.), 112 F. 2d 922, on the grounds that the *Palermo* case condemned an attempt to punish twice for a single criminal act. The *Palermo* case dealt with sentences for the same criminal conduct under present Section 545 of Title 18, United States Code, and also under the Narcotic Drugs Import and Export Act.

The *Mueller* case, 178 F. 2d 593, cited and relied upon the appellant herein, is a case where the defendant was charged with a violation of what is now Section 545 of Title 18, United States Code, in that he did import certain lottery tickets contrary to law. He contended that he should have been charged under what is now Section 1301 of Title 18, United States Code, to-wit, the specific section dealing with importing or transporting lottery tickets. The Circuit Court held that the action should have been brought under the specific section and cited the *Palermo* case as being controlling. It is respectfully submitted, however, that the *Palermo* case was properly distinguished in the *Kushner* case, *supra.* Appellee further contends that in any event the *Mueller* case is not controlling as the court there considered Congressional enactments of equal

dignity. It was not a case where the specific Congressional enactment was being weighed against a regulation of the Surgeon General.

If the appellant's contentions were sound they would apply only to that portion of Section 545 of Title 18, United States Code, which deals with the actual importation of merchandise as distinguished from receiving, concealing, and transporting, after importation. A reading of Count One of the Indictment discloses that in addition to charging conspiracy to import psittacine birds, the appellant is also charged with receiving, concealing, and facilitating the transportation and concealment after importation. As the Surgeon General's regulations pertain only to importation of the psittacine birds, it would in no wise affect the portions of Section 545 dealing with acts other than importation. Assuming, for the purpose of argument only, that the charge of importation should have been brought under the Surgeon General's regulation, and would therefore only be a misdemeanor, the appellant is still properly convicted upon his plea of guilty of conspiring to receive, conceal, and facilitate the transportation of psittacine birds. Where a conspiracy is shown to violate a number of laws, some of which define misdemeanors and some of which define felonies, it is clear that the sentences may be imposed on the basis of a conspiracy to commit a felony. Upon his plea of guilty to Count One, the defendant confessed all of the allegations contained therein, including the felony count of receiving, concealing and facilitating the transportation of merchandise in violation of Section 545 of Title 18, United States Code.

VI.

CONCLUSION.

As conspiracy is a separate and distinct crime from perjury, sentences may validly be imposed ~~concurrently~~ CONSECUTIVELY on each count of the Indictment, although the perjury is alleged to be a part of the conspiracy.

The Government may elect to proceed under either a General Act of Congress or a regulation of the Surgeon General where a violation of both is shown.

Where part of the criminal conduct contemplated by a conspiracy consists of misdemeanors and part felonies, the court may properly impose the penalty applicable to a conspiracy to commit a felony.

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